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Nos. 03-1164 and 03-1165

In the Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, INC., ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.*, and the Beef Promotion and Research Order, 7 C.F.R. Pt. 1260, violate the First Amendment insofar as they require cattle producers and importers to fund generic advertising promoting the desirability of eating beef.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 03-1164 are Ann Veneman, Secretary, United States Department of Agriculture, the United States Department of Agriculture, and the Cattlemen's Beef Promotion and Research Board. The petitioners in No. 03-1165 are Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones. The respondents in both cases are Livestock Marketing Association, Robert M. Thullner, John L. Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a)[1] is reported at 335 F.3d 711. The opinion of the district court (Pet. App. 31a-61a) is reported at 207 F. Supp. 2d 992.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on October 16, 2003 (Pet. App. 62a). On January 5, 2004,

[1] Pet. App. refers to the appendix to the petition for a writ of certiorari in No. 03-1164.

Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 13, 2004. The petition for a writ of certiorari in No. 03-1164 was filed on February 13, 2004, and the petition for a writ of certiorari in No. 03-1165 was filed on February 13, 2004. The petitions were granted and the cases were consolidated on May 24, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.*, is reproduced in the appendix to the petition (Pet. App. 63a-83a). The Beef Promotion and Research Order, 7 C.F.R. 1260.101 *et seq.*, is also reproduced in that appendix (Pet. App. 84a-119a).

STATEMENT

1. The United States regulates the production, processing, and marketing of beef. Federal law establishes a beef inspection program, see 21 U.S.C. 601 *et seq.*; prohibits deceptive marketing and price manipulation, see 7 U.S.C. 181 *et seq.*; mandates price reporting, 7 U.S.C. 1635 *et seq.*; and imposes requirements for organically produced beef, see 7 U.S.C. 6501 *et seq.* The United States Department of Agriculture (USDA) also operates a voluntary system of grading beef that encompasses most beef processed in the United States. See 7 U.S.C. 1621 *et seq.* At issue in this case is another federal beef program—The Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*

a. In the Beef Act, Congress found that (1) "beef and beef products are basic foods that are a valuable part of

the human diet," (2) "the production of beef and beef products plays a significant role in the Nation's economy," (3) "beef and beef products should be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and (4) "the maintenance and expansion of existing markets for beef and beef products are vital to the welfare of beef producers and those concerned with marketing, using, and producing beef products, as well as the general economy of the Nation." 7 U.S.C. 2901(a)(1), (2), (3), and (4). Based on those findings, Congress authorized the establishment of "a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." 7 U.S.C. 2901(b). Congress specified that its program would be financed "through assessments on all beef sold in the United States and on cattle, beef, and beef products imported into the United States." *Ibid.*

The Beef Act specifically directs the development of projects and plans of "promotion" and "advertising," "research," "consumer information," and "industry information." See 7 U.S.C. 2904(4)(B). Congress defined "promotion" as "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." 7 U.S.C. 2902(13).[2]

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[2] Congress defined "research" as "studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of beef and beef products, other related food science research, and new product development." 7 U.S.C. 2902(15). It defined "consumer information" as "nutritional data and other information that will assist consumers and other persons

The Beef Act directs the Secretary of Agriculture to promulgate an order to implement the Act's program, 7 U.S.C. 2903, and to conduct a referendum among cattle producers on its continuation within 22 months of the issuance of the order. 7 U.S.C. 2906(a). In 1986, the Secretary promulgated the Beef Promotion and Research Order (Beef Order), 7 C.F.R. Pt. 1260; see 51 Fed. Reg. 26,132, and in 1988, nearly 80% of cattle producers who voted in the referendum approved the order. J.A. 146. The Act authorizes the Secretary to conduct a subsequent referendum on the program's continuation when at least 10% of cattle producers request one. 7 U.S.C. 2906(b).

b. The Beef Act and the Beef Order establish two administrative entities to assist in developing and implementing beef promotion and research projects—the Cattlemen's Beef Promotion and Research Board (Beef Board) and the Beef Promotion Operating Committee (Operating Committee). 7 U.S.C. 2904(1)-(5); 7 C.F.R. 1260.141-1260.151, 1260.161-1260.169. The Beef Board is the larger of the two entities. It has 108 members, each of whom must be a cattle producer or importer. The Secretary appoints Board members based on nominations submitted by state associations that represent cattle producers within their respective States. 7 U.S.C. 2904(1), 2905; 7 C.F.R. 1260.141(b). A person cannot serve on the Beef Board for more than two consecutive three-year terms. 7 U.S.C. 2904(3).

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in making evaluations and decisions regarding the purchasing, preparing, and use of beef and beef products." 7 U.S.C. 2902(6). And it defined "industry information" as "information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry." 7 U.S.C. 2902(9).

The Operating Committee consists of 20 members, ten of whom are elected by the Beef Board from among its members and ten of whom are cattle producers "elected by a federation that includes as members the qualified State beef councils." 7 U.S.C. 2904(4)(A).[3] The federation-elected members must be certified by the Secretary as "producers that are directors of a qualified State beef council." 7 U.S.C. 2904(4)(A). A person cannot serve on the Operating Committee for more than six consecutive one-year terms. 7 U.S.C. 2904(5). The Secretary has authority to remove any member of the Beef Board or the Operating Committee if the Secretary finds that the member has failed to perform his duties properly or that his continued service would be detrimental to the purposes of the Act. 7 C.F.R. 1260.213.

The Beef Act delineates the functions of the Operating Committee and the Beef Board. The Operating Committee is responsible for "develop[ing] plans or projects of promotion and advertising, research, consumer information, and industry information." 7 U.S.C. 2904(4)(B). It also is responsible for "developing and submitting to the [Beef] Board, for its approval, budgets on a fiscal year basis of its anticipated expenses and disbursements." 7 U.S.C. 2904(4)(C). The Beef Board, in turn, is responsible for reviewing and approving the Operating Committee's annual budget and

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[3] A "federation" is "the Beef Industry Council of the National Live Stock and Meat Board or any successor organization," see 7 C.F.R. 1260.112, and a "qualified State beef council" is "a beef promotion entity" that is authorized by state statute or that is "organized and operating within a State, that receives voluntary contributions and conducts beef promotion, research, and consumer information programs, and that is recognized by the [Beef] Board as the beef promotion entity within such State." 7 U.S.C. 2902(14).

submitting the budget to the Secretary for approval. 7 U.S.C. 2904(4)(C). The Board is also responsible for administering the Beef Order and recommending amendments to it. 7 U.S.C. 2904(2).

c. By statutory directive, the activities of the Beef Board and the Operating Committee are funded by a $1 per head assessment (or "checkoff") on all beef and beef products sold in, or imported into, the United States. 7 U.S.C. 2904(8). The Beef Act prohibits the use of assessment revenues "in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the [Beef] [O]rder." 7 U.S.C. 2904(10). In States with a qualified state beef council, the state council collects the assessment, sending at least 50 cents of every dollar collected to the Beef Board and retaining the rest for activities authorized by the Beef Act, subject to the Beef Board's and the Secretary's supervision. 7 C.F.R. 1260.172; see 7 U.S.C. 2904(8).

d. The Secretary, through the Agricultural Marketing Service in the U.S. Department of Agriculture (USDA), exercises comprehensive control over the activities of the Beef Board and the Operating Committee. The Secretary must approve their annual budget, and they may incur only those expenses that the Secretary finds to be reasonable. 7 U.S.C. 2904(4)(C); 7 C.F.R. 1260.150(f) and (g); 7 C.F.R. 1260.151. The plans, projects, and contracts of the Operating Committee for promotion and research must be approved by the Secretary. 7 U.S.C. 2904(6)(A) and (B); 7 C.F.R. 1260.168(e) and (f). The Secretary may inspect and audit the books and records of the Beef Board and the Operating Committee at any time. 7 U.S.C. 2904(7)(A) and (B). The Secretary is also authorized to conduct such investigations as she deems necessary for the

effective administration of the Act and to determine whether any person has violated the Act or any order issued under it. 7 U.S.C. 2909. The Secretary is further authorized, following an opportunity for an administrative hearing on the record, to issue an order to restrain or prevent a violation of the order, assess a civil penalty of up to $5000 for a violation, and, through the Attorney General, bring enforcement actions in court. See 7 U.S.C. 2908.

USDA exercises approval authority over all advertising materials in advance of their dissemination. J.A. 114, 143, 274-275. Because USDA personnel work closely with the Beef Board and the Operating Committee from the inception of a project to resolve any potential concerns, USDA rarely has had to invoke its authority to block implementation of a project. J.A. 114, 118-121, 261, 275. USDA also reviews the projects undertaken by state associations using assessment funds. J.A. 115, 228-229, 280-281. At times, USDA has instructed the Beef Board, the Operating Committee, and state councils on certain projects the USDA expects them to undertake. J.A. 125-126, 142-143, 270, 272.

e. The Beef Act promotion and research program has been in operation for more than 15 years. In 2003, approximately 57 million head of cattle were marketed in the beef industry in the United States, having a total value of $45 billion. USDA, National Agricultural Statistics Service, *Meat Animals Production, Disposition and Income*, 2003 Summary, at 6, 8 (Apr. 2004); http://usda.mannlib.cornell.edu/reports/nassar/livestock/zma-bb/meat0404.pdf. The transactions generated $82.7 million to support the promotion and research activities of the Beef Board and their state counterparts. *Beef Board Report* at 3, http:/www.beefboard.org/

documents/Tracking2003%Your%Investment%20.2003.pdf. Advertising under the program over the years has included the "Beef. It's What's For Dinner." advertising campaign. J.A. 131. Research under the program has been conducted in such important areas as bovine spongiform encephalopathy or "mad cow disease." See J.A. 131, 226.

There are numerous comparable promotional programs for other agricultural products, including for such major sectors of the agricultural economy as milk, 7 U.S.C. 6401 *et seq.*, cotton, 7 U.S.C. 2101 *et seq.*, and pork, 7 U.S.C. 4801 *et seq.*.[4] States have also created their own promotional programs for agricultural products. See Brief of Texas, *et al.*, as Amicus Curiae at the Petition Stage at 15 & n.19.

2. In December 2000, respondents Livestock Marketing Association, Western Organization of Resource Councils, and several individual cattle producers filed suit against the Secretary, USDA, and the Beef Board, challenging aspects of the administration of the Beef Order. Pet. App.3a-4a. After this Court's decision in *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001), respondents amended their complaint to allege that the Beef Act and the Beef Order violate the First Amendment to the extent they require cattle producers and importers to pay assessments for generic advertising. Pet. App. 5a. Nebraska Cattlemen, Inc. and several individual producers (private petitioners) intervened to defend the Beef Act and the Beef Order.

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[4] See also 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 4601 *et seq.* (honey); 7 U.S.C. 4901 *et seq.* (watermelon); 7 U.S.C. 7481 *et seq.* (popcorn).

After a two-day trial, the district court held that the Beef Act violates the First Amendment "because it requires [respondents] to pay, in part, for speech to which [they] object." Pet. App. 48a. The court held that generic advertising conducted under the Beef Act is not government speech. *Id.* at 49a-57a. In so holding, the court relied on the fact that the advertising is funded by assessments on cattle producers and importers and not by general tax revenue. *Id.* at 53a-54a. In addition, the court concluded that the Beef Board is composed of private individuals, and that USDA exercises only ministerial oversight of the Board. *Id.* at 54a-55a.

The court did not analyze the Beef Act under the intermediate scrutiny analysis articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 563-566 (1980). The court viewed that standard as applying only to "restriction[s] on commercial speech," as distinguished from "compelled funding of speech." Pet. App. 40a. The court also held that the Beef Act could not be sustained under *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), as germane to a broader regulatory scheme. The court concluded that, like the mushroom program invalidated in *United Foods*, "the principal object of the beef checkoff program is the commercial speech itself." Pet. App. 47a. As relief, the district court entered a declaratory judgment stating that the Beef Act and the Beef Order "are unconstitutional and unenforceable," and issued an injunction barring petitioners from "any further collection of beef checkoffs." *Id.* at 60a-61a.

3. The court of appeals affirmed. Pet. App. 1a-30a. The court acknowledged that the "government speech doctrine has firm roots in our system of jurisprudence." *Id.* at 15a. The court reasoned, however, that the doc-

trine protects the government only against challenges to its "choice of content," not against challenges, such as the one in this case, to "the government's authority to compel [persons] to support speech with which they personally disagree." *Id.* at 17a.

The court of appeals next held that *Central Hudson*'s intermediate scrutiny standard provides the appropriate framework for assessing the constitutionality of such compelled funding. Pet. App. 22a. The court did not, however, undertake a conventional *Central Hudson* inquiry. Instead, the court viewed as dispositive under *Central Hudson* the distinction drawn in *United Foods* between compelled funding of advertising that is germane to a larger regulatory program and compelled funding of a program where the principal object is the advertising itself. Finding that the Beef Act program, like the mushroom program invalidated in *United Foods*, falls into the latter category, the court of appeals summarily concluded that the Beef Act does not serve a governmental interest that is "sufficiently substantial to justify the infringement on [respondents'] First Amendment free speech right." *Id.* at 28a. Having found the Beef Act unconstitutional on that ground, the court of appeals affirmed the district court's injunction against the collection of all assessments under the Act. *Id.* at 28a-29a.

SUMMARY OF ARGUMENT

I. The Beef Act establishes a valid program of government speech. Generic advertising under the Act conveys the government's message that beef is desirable to eat, and nothing in the Act prevents individual producers from adding their own advertising messages to that one. The Beef Act also solves a serious collective action/free rider problem—that generic advertising

is necessary to promote the health of an important sector of the economy, but no individual producer benefits enough to justify paying for advertising on which other producers would free ride. The First Amendment does not prevent the government from solving that serious problem through a program of government speech.

The First Amendment limits the government's authority to interfere with private speech; it does not constrain the government's own speech. The government may speak either through government officials and entities, or it may transmit its message through private individuals or entities. In either event, the government may say what it wishes without implicating the First Amendment. The Beef Act is constitutional under that government speech doctrine.

Advertising under the Beef Act is government speech because the government controls the content of the advertising. First, Congress itself has specified the central message to be disseminated—that it is desirable to eat beef. Second, Congress has created two entities —the Beef Board and the Operating Committee—to develop and implement specific advertising campaigns that will convey that message. And third, Congress has entrusted to the Secretary of Agriculture ultimate control over the content of the advertising.

The court of appeals held that, while individuals may not object to the content of government speech, they may object to a requirement to fund it. But the government speech doctrine not only permits the government to choose the content of its speech; it also allows the government to raise the money necessary to fund it. The court of appeals' contrary approach would eviscerate the government speech doctrine. Under the court of appeals' novel analysis, persons could not object to

the content of United States Army advertising, but they could seek a refund of the portion of their tax dollars devoted to it. Government could not function effectively if such suits could be maintained.

Even if confined to government speech funded through targeted assessments, rather than through general public revenues, the court of appeals' theory is untenable. The First Amendment is not offended by efforts to pair up expenditures with related streams of revenue. For example, a state university may decide to fund its course offerings through tuition payments by students, rather than general tax revenues, because the students are the ones who will benefit most from the offerings. That funding decision would not empower students to insist on a rebate for course content with which they disagree. That rationale applies equally here. Congress reasonably imposed the costs of the Beef Act program on importers and cattle producers because they are participants in the industry Congress sought to promote and because they most directly reap the benefits of the government's pro-beef message.

The district court's conclusion that advertising under the Beef Act is not government speech in the first place is riddled with legal and factual error. For example, the district court viewed it as important that Beef Act advertising is funded through targeted assessments rather than general revenues. But in deciding whether speech is government speech, the critical question is not the method of funding, but whether the government controls the content of the message, and here it does.

The district court's observation that Beef Board members are private individuals is incorrect. Under *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board is a government entity for First Amendment purposes, and, when they act in their

official capacities, Board members are government officials. But even if the Beef Board were a private entity, it would not change the analysis because, under the government speech doctrine, Congress is free to enlist private entities to disseminate its message. And that is particularly true here since the Secretary has the final say on what particular advertisements will be disseminated.

The district court's finding that the Secretary engaged in only ministerial review of Board activities is legally and factually in error. The Secretary has plenary authority to decide what advertising will be disseminated, and USDA personnel are deeply involved in particular advertising projects from their inception. Regardless of the precise extent of the Secretary's involvement, however, it remains the case that Congress has specified the central message, and the Secretary is accountable for the particular advertisements that are disseminated. Those characteristics are sufficient to establish that advertising under the Beef Act is government speech.

II. The Beef Act is also constitutional because it satisfies intermediate scrutiny. The Court applies intermediate scrutiny when the government restricts a person from engaging in his own commercial speech. Because a requirement to fund money for commercial speech increases the amount of information available to consumers, the government should have more flexibility to impose such a requirement than to restrain commercial speech. At the very least, however, such a program should not be subjected to a more intense level of review.

Under intermediate scrutiny, the Beef Act is constitutional. First, the Beef Act program serves substantial governmental interests: enhancing the welfare

of a vital sector of the economy, stabilizing the general economy of the country, and ensuring adequate nourishment. Second, advertising under the Beef Act directly serves those interests because it stimulates demand for beef. Third, imposing the costs on those who benefit the most from the program is integral to its success. That method gives the producers a stake in the program, while funding through general venues would have risked undermining the very public support Congress sought to engender, and a voluntary program would have simply highlighted the collective action/free rider problem the legislation is designed to address.

Finally, the Beef Act is carefully tailored to achieve its objective. It does not restrain producers from communicating any message they choose, and it does not require them to ascribe to any particular point of view. Instead, it requires only that cattle producers contribute financially to advertising that promotes the very product that they have chosen to market.

Thus, the Beef Act is constitutional both because it is a permissible program of government speech and because it satisfies intermediate scrutiny. The court of appeals' judgment invalidating the Beef Act should be reversed.

ARGUMENT

I. GENERIC ADVERTISING UNDER THE BEEF ACT IS GOVERNMENT SPEECH AND THEREFORE MAY BE FUNDED THROUGH ASSESSMENTS ON CATTLE PRODUCERS AND IMPORTERS WITHOUT IMPLICATING THE FIRST AMENDMENT

The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." When the government adds its voice to the voices of others, and does not constrain

others from speaking, it does not abridge the freedom of speech. The Beef Act is constitutional under that government speech doctrine. Generic advertising under the Beef Act conveys the government's message that beef is desirable to eat, and nothing in the Beef Act restrains individual producers or anyone else from adding their own distinctive voices to that message or from taking a different point of view. The Beef Act also solves a serious problem—that generic advertising is necessary to promote the desirability of beef and beef products and the health of an important sector of the economy, but no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. The First Amendment does not preclude the government from solving that serious problem through a program of government speech.

A. The First Amendment Permits The Government To Engage In Its Own Speech And To Use Funds It Has Raised To Convey That Speech

1. The First Amendment's Free Speech Clause limits government interference with private speech; it does not place any limit on the government's own speech. Thus, "when the State is the speaker, it may make content-based choices," and "it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995).

That principle applies not only when government officials deliver the message themselves, but also when the government "disburses public funds to private entities to convey a governmental message." *Rosenberger*, 515 U.S. at 833. In *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991), for example, the Court rejected a First Amendment challenge to a federal statute and implementing regulations that provided for grants to

private organizations to furnish counseling to patients about family planning, but prohibited the use of those funds to counsel patients about abortion as a method of family planning. The Court explained that, within broad limits, when Congress furnishes federal funds to establish a program, it is entitled to define the limits of the program. *Id.* at 194.

Although "*Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," subsequent cases "have explained *Rust* on this understanding." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) (citing cases). Thus, the Court noted in *Velazquez* that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U.S. 217, 229, 235 (2000), or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.' *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)." 531 U.S. at 541; see also *id.* at 542-543. As *Rust* illustrates, "it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their * * * favored point of view * * * by advocating it officially * * * or by giving money to others who * * * advocate it." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring). Nor does it raise distinct First Amendment problems if the government-funded speakers are given some latitude as to how they chose to further the government's chosen message. See pp. 20-21, *infra*.

In *Rosenberger*, the Court struck down what it found to be a viewpoint-based restriction on the eligibility of a

student organization to receive reimbursement of the costs of its newsletter out of student activity fees assessed against students each semester. The Court concluded that the program in question, which was designed not to subsidize a message the government favored, but rather to promote a diversity of views from private speakers separate from the university, was analogous to a limited public forum established by the government, in which viewpoint discrimination is not permitted under the First Amendment. See 515 U.S. at 830, 833-835. In this case, by contrast, the Beef Act and Beef Order establish a program for the government "itself [to] speak or subsidize transmittal of a message it favors," *id.* at 834, not to encourage a diversity of views by private speakers, as in *Rosenberger*, or to enable a private association, such as a labor union, to engage in whatever speech it might choose independent of any governmental message or approval.

The Beef Act responds to a classic collective action problem that limits private advertising of generic products, like beef. Although all beef producers benefit from generic advertising promoting beef, no individual producer benefits enough to justify paying for advertising on which other producers would be free riders. See J.A. 168. In the absence of government intervention, the concentrated costs and widely dispersed benefits make advertising a generic product economically infeasible for most individual producers. *Ibid.*; see generally M. Olson, *The Logic of Collective Action* 43-48 (1971). Because of the public interest in such advertising, the Beef Act directs government speech to address that serious problem. That has been Congress's rationale for such agricultural commodity promotion programs generally, including the program established by the Beef Act. See 7 U.S.C. 7401(b)(7) ("a generic com-

modity promotion program is intended and designed to maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ"); see also 7 U.S.C. 7401(b)(10) (small producers "often lack the resources or market power to advertise on their own" and "are otherwise often unable to benefit from the economies of scale available in promotion and advertising").[5]

2. Government speech necessarily is paid for by private individuals and entities, some of whom may disagree with the government's message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse those who object from having to share the costs of the program. As this Court has recognized, "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties," *Southworth*, 529 U.S. at 229, and that principle applies as much to government speech programs as to other valid government programs. Thus, notwithstanding sincere objections from those who are required to bear the costs, "funds raised by the government [may] be spent for speech and other expression to advocate and defend [government] policies." *Ibid.*; see also *id.* at 234-235. To take just one example, "[a] federal taxpayer

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[5] The government is free under the First Amendment to impose reasonable limitations on the type of private expression—*e.g.*, artistic expression—it will subsidize, even where the private recipients of the subsidies are not conveying a governmental message. See *Finley*, 524 U.S. at 584-587; *id.* at 595-600 (Scalia, J., concurring in the judgment). This case, however, does not involve such a program.

obtains no refund if he is offended by what is put out by the United States Information Agency." *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment).

The principle that the government may spend the money it has raised to support its point of view is critical to the functioning of government. "It is the very business of government to favor and disfavor points of view." *Finley*, 524 U.S. at 598 (Scalia, J., concurring). Accordingly, if every citizen could obtain a refund when the government spends tax dollars to further a point of view with which the taxpayer disagrees, "debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller* v. *State Bar*, 496 U.S. 1, 12-13 (1990).

The absence of First Amendment scrutiny for government speech programs does not leave those objecting to it without recourse. "When the government speaks * * * to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate, and the political process for its advocacy." *Southworth*, 529 U.S. at 235. "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.* Furthermore, in the present context, if the persons who object are cattle producers, they may seek to obtain the support of the requisite 10% of the producers and request the Secretary to hold a referendum on the question of rescinding the Beef Order. See 7 U.S.C. 2906(b).

B. Generic Advertising Under The Beef Act Is Government Speech Because Congress Specified The Basic Message, Created Two Administrative Entities To Disseminate It, And Vested Ultimate Editorial Control Of The Message In The Secretary Of Agriculture

1. A program involves government speech when the government controls the content of the speech that is disseminated under it. In contrast, when the government funds speech, but allows private parties to determine its content, government speech is not involved. *Rosenberger* demonstrates the importance of the element of control to the government speech inquiry. Because the university's agreement with participating student groups specified that the speech would not be "subject to [the university's] control," the Court held that the program did not involve government speech. 515 U.S. at 834-835. On the other hand, the Court made clear in *Rosenberger* that a university's course offerings do involve government speech because "[w]hen the University determines the content of the education it provides, it is the University speaking." *Id.* at 833.

A program may involve government speech even when the government does not exercise control over the precise words that are used to disseminate its message. For example, in the program at issue in *Rust*, private doctors and other counselors chose the precise words that would be used to advise patients about family planning options. The speech at issue was nonetheless government speech because Congress chose the family planning topics that it would fund and then used private grantees to counsel and transmit information to patients on those topics. *Rosenberger*, 515 U.S. at 833. Similarly, in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 306 (2000), the Court held that an

invocation delivered at school events by a student selected in a school election was government speech for Establishment Clause purposes even though the school did not determine "the particular words used by the speaker." Because the school had established regulations to "confine the content and topic of the student's message" and solicited an "invocation" that would "solemnize the event," the student's religious invocation was properly regarded as government speech. *Id.* at 302-303, 306-307. Thus, when the government establishes the basic message, but gives private parties discretion to choose the words to convey that message, the resulting speech remains government speech.

2. Advertising under the Beef Act is government speech because the government controls the content of the advertising in three significant ways. First, through its definition of the term "promotion," Congress itself has specified the central message that Beef Act advertising must convey—that it is desirable to eat beef. See 7 U.S.C. 2902(13) (defining "promotion as "any action, including paid advertising, to advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the market place"). Congress has further provided that advertising must "take into account similarities and differences between certain beef, beef products, and veal," and "ensure that segments of the beef industry that enjoy a unique consumer identity receive equitable and fair treatment." 7 U.S.C. 2904(4)(B)(i)-(ii). At the same time, Congress has prohibited the use of any funds collected under the Beef Act from being used to "influenc[e] governmental action or policy, with the exception of recommending amendments to the order." 7 U.S.C. 2904(10). Thus, in the Beef Act, even more so

than in the statute at issue in *Rust*, Congress itself has determined the content of the speech to be disseminated.

The conclusion that Beef Act speech is government speech does not, however, rest solely on Congress's specification of the basic message. A second important consideration is that Congress created two entities—the Beef Board and the Operating Committee—to develop and implement specific advertising campaigns that will convey Congress's message that it is desirable to eat beef. Congress's use of statutorily created entities for those purposes reinforces the conclusion that Beef Act speech is government speech.

Indeed, under this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board is a government entity for First Amendment purposes. In that case, the Court held that an entity is a governmental entity for First Amendment purposes when (1) it is created by special law, (2) it is designed to further governmental objectives, and (3) a majority of the members are appointed by the government. The Beef Board has each of those characteristics. It is created by special law—the Beef Act. It is designed for the furtherance of governmental objectives—to protect an industry that is vital to the national economy and to promote adequate nutrition. See 7 U.S.C. 2901(a)(3) and (4). And the government, through the Secretary, appoints all of the Beef Board's members. 7 U.S.C. 2904(1). Consistent with its status as "an integral part of the Department of Agriculture," the Internal Revenue Service has ruled that the Beef Board is exempt from federal taxation. J.A. 148.

The Operating Committee is created by the same special law as the Beef Board and is designed to further the same governmental objectives. One-half of the

members of the Operating Committee are Secretarial appointees, rather than a majority, 7 U.S.C. 2904(4)(A). But the Secretary may remove *any* member from the Operating Committee if, in the Secretary's judgment, the member fails to perform his duties properly or his continued service would be detrimental to the purposes of the Act. 7 C.F.R. 1260.213. In terms of the capacity to control, that power of removal is significant. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986). Accordingly, the involvement of the Beef Board and the Operating Committee in developing and implementing Beef Act advertising campaigns further demonstrates that Beef Act speech is government speech.

Congress was not content, however, to leave the dissemination of its message to those two entities. It took the further step of entrusting to a politically accountable Cabinet officer—the Secretary of Agriculture —ultimate control over the advertising that is disseminated under the Act. The annual budget proposed by the Beef Board and the Operating Committee must be approved by the Secretary. See 7 U.S.C. 2904(4)(C), 7 C.F.R. 1260.150(f) and (g), 1260.168(d). Even more important, each particular advertising plan and project proposed by the Operating Committee must be approved by the Secretary. 7 U.S.C. 2904(6)(B), 7 C.F.R. 1260.168(e) and (f). Through that statutory approval authority, the Secretary can exercise editorial control over all advertising and ensure that the advertising disseminated under the Beef Act effectively promotes Congress's central message that it is desirable to eat beef and adheres to the other provisions of the

Act that govern promotional activities. See 7 U.S.C. 2904(4)(B)(i) and (ii).

To the extent the Act permits the involvement of industry representatives within the overall framework of government control of the speech, that private involvement does not raise any First Amendment difficulties. As *Rust* establishes, the government may enlist private actors in disseminating the government's message without rendering the resulting speech private, rather than government, speech. Indeed, it promotes First Amendment values for the government to allow knowledgeable actors in the private sector—the doctors and counselors in *Rust* and the beef producers here—to have a role in shaping and transmitting the government's message in the most effective manner to consumers.

In sum, three structural elements in the Beef Act work together to establish government control of the content of Beef Act advertising: Congress has specified the central pro-beef message; two statutorily created bodies help to develop and implement specific campaigns to disseminate that message; and a politically accountable government official has ultimate control over what is said. Those three statutory features establish that Beef Act speech is government speech as a matter of law.

C. The Court of Appeals Erred In Holding That The Government Speech Doctrine Insulates The Government From Challenges To The Content Of The Government's Speech But Not From Challenges To Assessments That Are Imposed To Fund Government Speech

The court of appeals did not hold that advertising under the Beef Act is not government speech. Rather, it held that the government speech doctrine insulates

the government only from a First Amendment challenge based upon the government's choice of content, not from a challenge to a requirement to contribute to the funding of government speech. Pet. App. 16a-17a. That novel conception of the government speech doctrine is mistaken. The government speech doctrine not only permits the government to say what it wishes; it also permits the government to raise the money to do so. *Southworth*, 529 U.S. at 229.

1. In drawing a distinction between challenges to content and challenges to funding requirements, the court of appeals relied primarily on this Court's compelled funding cases—*Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), *Keller*, *Southworth*, and *United Foods*. Pet. App. 17a-19a. Those cases, however, do not support the court's cramped view of the government speech doctrine. Indeed, the court of appeals' reasoning would effectively eviscerate the government speech doctrine.

In *Abood*, the Court held that an individual has a First Amendment right to refrain from funding speech to which he objects unless a sufficiently important government interest outweighs the individual's First Amendment interest. Applying that standard, the Court held that individuals could be required to fund a union's collective bargaining activities, but that they could not be forced to fund ideological speech that was not germane to those activities. 431 U.S. at 225-226, 235-236. Because *Abood* involved funds raised to support the speech of a private union, not funds raised to support government speech, the Court's holding necessarily was limited to that private speech context. Indeed, because virtually all government speech is funded by money "compelled" from taxpayers, application of the *Abood* rationale to government speech

would be debilitating. Justice Powell emphasized this point in his concurring opinion. "Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent." *Id.* at 259 n.13 (Powell, J., concurring in the judgment).

In *Keller*, the Court held, in reliance on *Abood*, that state bar members could not be compelled to fund ideological speech of the state bar that was not germane to the bar's role in regulating the legal profession or improving the quality of legal services. 496 U.S. at 14. Before reaching that conclusion, however, the Court first held that the state bar was not engaged in government speech. *Id.* at 11-13. *Keller* thus proceeded on the understanding that the government speech doctrine would defeat a First Amendment objection to compelled contributions to support a program of government speech. See *id.* at 13.

In *Southworth*, the Court held that university students may not be required to pay for student speech to which they object unless the university is viewpoint-neutral in its funding of student speech. 529 U.S. at 231-233. Critical to the Court's holding, however, was that the university had "disclaimed that the speech [was] its own." *Id.* at 229. The Court emphasized that "[w]here the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different." *Id.* at 235. The Court added that it had not "held, or suggested, that when the government speaks the rules we have discussed come into play." *Ibid.*

Finally, in *United Foods*, the Court applied the *Abood* principle in invalidating a program of compelled funding for the generic advertising of mushrooms. 533 U.S. at 413. Once again, the Court did not suggest that the *Abood* principle would apply to a program of government speech. The United States in that case sought to defend the advertising program under a government speech rationale. But because it had not raised that argument in the court of appeals, and the court of appeals had not passed on it, the Court declined to reach that issue. *Id.* at 416-417. In sum, the *Abood* principle applies when the government compels funding for private speech, but that principle has no application to government speech.

2. The court of appeals also sought to derive support for its conception of the government speech doctrine from this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977). Pet. App. 19a, 23a n.9. In *Wooley*, the Court held that a State could not require a motorist to display a state motto on his licence plate. The Court relied on its prior decision in *Board of Education* v. *Burnette*, 319 U.S. 624 (1943), which held that a State could not require public school students to recite the pledge of allegiance and salute the flag.

Neither *Burnette* nor *Wooley* provides any support for the court of appeals' conception of the government speech doctrine. A requirement that persons contribute to the costs of a government speech program "does not require [such persons] to repeat an objectionable message out of their own mouths," or "require them to use their own property to convey an antagonistic ideological message." *Glickman* v. *Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 471 (1997). *Burnette* and *Wooley* are therefore "clearly inapplicable" to a pro-

gram such as that established by the Beef Act. *Id.* at 470.

3. Acceptance of the court of appeals' mistaken understanding of the government speech doctrine would have staggering consequences. Under that analysis, the government speech doctrine would insulate a challenge to the content of the speech disseminated by the United States Information Agency, but it would not bar a taxpayer from seeking a refund of the portion of his taxes devoted to that program. Taxpayers could not object to the content of advertising that solicits volunteers for the Armed Services, but they could seek refunds for the portion of their taxes devoted to the advertisements. Countless other refund actions could be brought by those objecting to other government speech programs. Government could hardly function if such suits were permitted. Cf. *United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

4. Even if confined to challenges to targeted assessments, rather than expenditures from general revenue, the court of appeals' novel limitation on the government speech doctrine is untenable. For example, in order to escape a First Amendment challenge, a state university would have to fund its course offerings from general tax revenues, rather than from tuition payments by students. The First Amendment, which prohibits the abridgment of *speech*, does not impose that kind of straightjacket on the tax and fiscal policies of the government. To the contrary, the Court made clear in *Southworth* that "[t]he government, as a general rule, may support valid programs by taxes *or other exactions* binding on protesting parties." 529 U.S. at 229 (empha-

sis added). A decision to impose the costs of course offerings on students does not reflect any purpose to force students to assent to ideas with which they disagree. Instead, it reflects the common-sense notion that the costs of a university's offerings should be borne by those who benefit from them most directly.

That same notion underlies the targeted assessments at issue here. Congress imposed the costs of Beef Act advertising on cattle producers and importers because they are participants in the industry Congress sought to promote, because they are the participants with incentives to free ride in a way that leads to a collective action problem, and because they "most directly reap the benefits of" the government's pro-beef message. 7 U.S.C. 7401(b)(2). Moreover, the sales transactions by producers and importers within the beef industry represent an identifiable, administrable, and well-tailored basis for assessing the costs against that industry as a whole. By contrast, imposing the costs of the program on taxpayers generally would have risked undermining the very support for the beef industry that Congress sought to engender. And, by funding the program through targeted assessments, rather than through general revenues, Congress was able to respect the traditions of an industry averse to receiving something for nothing. See 121 Cong. Rec. 38,116, 31,439, 31,448 (1975).

In any event, Congress's decision to match up a revenue stream to the perceived beneficiaries of the Beef Act as opposed to funding the program through general revenues does not raise any distinct First Amendment problem. Government speech pursuant to the Beef Act would be unobjectionable if funded through the general treasury; it does not become

unconstitutional because the assessments are targeted to those directly affected by the program.

5. Congress's decision to impose the costs of Beef Act advertising on those who most directly benefit from it is firmly grounded in this Court's decisions. For example, in *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989), the Court upheld a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the United States as reimbursement for government expenses incurred in connection with the Tribunal. The Court rejected the argument that the fee was unconstitutional because it was being charged for a service that the claimant was being forced to use. *Id.* at 63. The Court explained that the government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Ibid.*

Persons who engage in expressive activity protected by the First Amendment may also be assessed fees for government services from which they derive a particular benefit. For example, persons have a First Amendment right to use the public streets for communicative purposes, but, in order to offset administrative and law enforcement expenses related to that activity, the government may impose a fee on those who exercise that right. *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941). Similarly, while persons have a First Amendment right to file suit in court to seek a redress of alleged wrongs, *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984), they nonetheless may be required to pay a filing fee in order to offset some of the court's operating costs. *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). And "[n]o one questions * * * that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even

though the user fee measurably reduces the ability of various persons or organizations to communicate with others." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring). A fortiori here, persons who engage in *non-expressive* commercial transactions may be assessed a modest fee to support the costs of a government program that is designed to promote the very industry and transactions in which they have chosen to participate.

Congress's choice of the funding mechanism for the Beef Act program is also consistent with the Court's recognition of Congress's authority to impose an exaction that is tied to the operation of a business, such as the Social Security tax upheld in *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Similarly, the Beef Act assessment is consistent with Congress's authority to impose an assessment on the sale of a commodity, such as the tax on the sale of gasoline upheld in *Gurley* v. *Rhoden*, 421 U.S. 200 (1975).

The cases discussed above do not involve assessments to support government speech programs. But given the importance of government speech to the functioning of government, there is no apparent reason why Congress should have less flexibility in deciding how to fund programs involving such speech than it has in deciding how to fund other government programs. Moreover, because the government is uniquely positioned to solve the collective action/free rider problem posed by advertising of generic products, a rule prohibiting targeted assessments to promote generic advertisements would leave that serious problem unremedied unless assessments were levied on all taxpayers.

Respondents may prefer that the government fund Beef Act speech in a different way, or indeed, not at all.

But their recourse is the same that exists for any taxpayer opposed to the government's message—to seek a change through the political process. Respondents may try to convince Congress to terminate the program, or they may try to persuade cattle producers and the Secretary to hold a statutorily authorized referendum on the program's continuation. 7 U.S.C. 2906(b). But they do not have a First Amendment right to force the government to fund the program in a particular way.

D. The District Court's Conclusion That Beef Act Speech Is Not Government Speech Is Based On Erroneous Legal Analysis And Is Not Supported By The Record

The district court did not adopt the court of appeals' novel limitation on the government speech doctrine. It nonetheless rejected the government's reliance on the government speech doctrine because it concluded that advertising and other promotional activities pursuant to the Beef Act are not government speech to begin with. That conclusion rests on erroneous legal analysis and on factual findings that are not supported by the record.

1. The district court concluded that Congress's choice to fund promotional activities under the Beef Act through a targeted assessment rather than through general revenues shows that those activities are private rather than government speech. Pet. App. 53a-54a. But the question whether a program involves government speech depends on whether the government controls the content of the message, *Rosenberger*, 515 U.S. at 833-835; *Sante Fe*, 530 U.S. at 306-307, not on what mechanism the government uses to raise the money necessary to disseminate it. As pre-

viously discussed, the government controls the content of the speech that is disseminated under the Beef Act.

Moreover, to the extent that the nature of the funding is relevant to the government speech inquiry, it reinforces the conclusion that Beef Act speech is government speech. To secure the funding necessary to support the Beef Act program, Congress did not depend on voluntary donations by private actors. Instead, it imposed a mandatory $1 per head assessment on all beef and beef products sold in, or imported into, the United States, 7 U.S.C. 2904(8), and authorized the Secretary to institute administrative or judicial proceedings to enforce the Beef Act and the Beef Order, including their assessment provisions, 7 U.S.C. 2908 and 2909. Thus, just as Congress has assumed responsibility for the content of Beef Act speech, it has also assumed responsibility for ensuring that it is funded.

2. The district court viewed Beef Act speech as private speech in part because it concluded that the Beef Board is composed of private individuals. Pet. App. 54a-55a. That finding is legally incorrect. As previously discussed, under *Lebron*, when an entity is created by special law to serve a public purpose, and its members are government-appointed, the entity is a government entity. Because the Board is created by special law to serve a public purpose and the Secretary appoints all its members, the Board is a government entity, and, insofar as they act in their official capacities, the Board's members are government officials for purposes of the First Amendment.[6]

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[6] The district court's finding that the Secretary engages in "pro forma" "approval" of Board members (Pet. App. 55a) is both legally and factually incorrect. Board members are "appointed by

The district court attempted to distinguish *Lebron* on the ground that it involved the question whether an entity is a governmental entity when it restrains speech, not whether it is a governmental entity when it speaks itself. Pet. App. 53a. But *Lebron* categorically held that the existence of the three specified factors means that an entity "is part of the Government *for purposes of the First Amendment.*" 513 U.S. at 400 (emphasis added). Moreover, the district court offered no explanation for how an entity could transmute itself from a governmental entity to a private entity depending on whether it is restraining speech or speaking. If Amtrak is a governmental entity when it restrains speech, as the Court held in *Lebron*, there is no reason that it would not also be a governmental entity when it promotes rail transportation.

In deciding whether Beef Act speech is government speech, however, it does not ultimately matter whether the Beef Board is a governmental or a private entity. As already discussed, under this Court's decisions, Congress is free to enlist private entities to help promote a government message. *Velazquez*, 531 U.S. at 541-542; *Rosenberger*, 515 U.S. at 893; *Rust*, 500 U.S. at 192-193. Thus, even if the Beef Board were a private entity, Congress could enlist its help in promoting the government's message that it is desirable to eat beef. That is particularly true since the Secretary, rather than the Beef Board, has the final say on what promotional activities will be conducted.

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the Secretary," not approved. 7 U.S.C. 2904(1). The Secretary receives at least two nominations for each position. J.A. 116, 267. And before a final selection is made, applications of the nominees are reviewed and background checks are conducted. J.A. 150, 267.

3. The district court concluded that the Secretary's involvement in the dissemination of advertising under the Beef Act does not support the conclusion that it is government speech because, in the court's view, the Secretary conducts only "ministerial review" of Beef Board activities. Pet. App. 55a. But the Secretary's approval authority is not so constrained. The Secretary has plenary authority to decide whether to approve advertising projects, 7 U.S.C. 2904(4)(C), 2904(6)(A) and (B), and in practice, USDA exercises approval authority over all advertising before it is disseminated. J.A. 114, 143, 274-275. USDA has rejected specific advertising messages, such as one that would have disparaged chicken, J.A. 114, 118, 261, 275, and it has edited particular Board communications. J.A. 114, 119-121. Formal disapproval of Board projects does not occur often. But that is not surprising. USDA, the Beef Board, and the Operating Committee are all charged with furthering the central message of the Beef Act, and USDA personnel work closely with the Beef Board and the Operating Committee on the development of particular advertising projects from their inception. J.A. 111-114, 274.[7]

In any event, regardless of the precise extent of the Secretary's involvement in that process, it remains the case that Congress has chosen the basic message to be conveyed, and the Secretary is accountable for every promotion plan and project because they all must be

[7] The district court based its finding that USDA exercises only ministerial review on a purported admission by a USDA official. Pet. App. 55a. That official, however, made no such admission. To the contrary, he explained the extensive nature of USDA involvement in the dissemination of Beef Act speech. J.A. 111-116, 268-277, 303-304.

approved by her Department. The relevant federal agency in *Rust* did not have *any* prior approval authority or involvement in the development of counselors' communications with their individual patients, yet the Court sustained the constitutionality of that program. The conclusion that Beef Act speech is government speech follows *a fortiori* from *Rust*.

4. The district court similarly erred in relying on certain Beef Board communications that have stated that the Beef Board is producer-controlled, that the Beef Act program is industry-run, and that the Beef Board is accountable to producers. Pet. App. 55a. Those statements do not change the legal characteristics that make Beef Act speech government speech. Beef Board members are drawn from the ranks of cattle producers, and the producers therefore necessarily play an important role in the operation of the Board and in the shaping of the Beef Act program. But Congress's eminently sensible decision to enlist the expertise of representatives of persons who are involved in producing the beef and beef products Congress has chosen to promote—and indeed to condition the continuation of the program on their assent in a referendum, *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939)—serves to lessen not to exacerbate the basis for a claim that the program infringes on the interests of participants in the industry. Moreover, because the Beef Act cures the collective action/free rider problem through prescription of the central message, mandatory assessments, and mechanisms to review the resulting advertising, efforts to involve the industry in other ways is fully consistent with Congress's regulatory objectives and does not raise distinct First Amendment concerns. In any event, it remains the case that Congress has determined the basic message, the Beef

Board is legally a governmental entity under *Lebron*, and the Secretary has the final say on the particular advertisements that will be run.[8]

In sum, the district court's government speech analysis is riddled with legal and factual error. Under the correct legal analysis, Beef Act speech is government speech, and the assessments imposed to support that speech do not implicate the First Amendment.

II. THE BEEF ACT SATISFIES INTERMEDIATE SCRUTINY AND IS CONSTITUTIONAL FOR THAT REASON AS WELL

1. Even if the government speech doctrine did not fully insulate Beef Act assessments from First Amendment challenge, those assessments would, at most, be subject to intermediate constitutional scrutiny. Even in the *Abood* context, where government speech is not at issue, the government may impose assessments to fund speech to which a person objects when the government's interest is sufficiently important to outweigh the interference with that person's First Amendment interest in avoiding the assessment. See 431 U.S. at 222 (holding that compelled funding of union activities "is constitutionally justified by the legislative assess-

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[8] The district court found that Beef Act speech is private speech in part because Beef Act advertisements bear the copyright of the Beef Board and the National Cattleman's Beef Association, rather than USDA. Pet. App. 56a. Under the Beef Act Order, however, all "copyrights * * * developed through the use of funds collected by the Board * * * shall be the property of the U.S. Government as represented by the Board." 7 C.F.R. 1260.215(a). That copyright rule eliminates the district court's concern and reinforces the conclusion that Beef Act speech is government speech.

ment of the important contribution of the union shop to the system of labor relations").

Abood not only involved private speech, rather than government speech; it also upheld funding for activities that implicate a broad range of ideological, moral, religious, economic, and political interests. As the *Abood* Court explained, one employee's "moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan;" another employee "might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class;" still another employer "might have economic or political objections to unionism itself;" and another employee "might object to the union's wage policy because it violates guidelines designed to limit inflation." 431 U.S. at 222. Beef Act speech, by contrast, involves the promotion of the very product that the persons assessed have chosen to produce and sell. Because of those differences between the Beef Act and the program upheld in *Abood*, the Beef Act should more readily survive constitutional scrutiny. At the very least, however, it should not be subjected to a higher level of scrutiny.

This Court also applies intermediate scrutiny when Congress prohibits a person from engaging in his own commercial speech. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). In that context, the challenged restriction is constitutional if it (1) promotes a "substantial" government interest, (2) "directly advances the governmental interest asserted," and (3) is "not more extensive than is necessary to serve that interest." *Id.* at 566. That standard does not require a legislature to employ "the least restrictive means" of regulation or to achieve a perfect

fit between means and ends. *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989). It is sufficient that the legislature achieves a "reasonable" fit by adopting regulations "in proportion to the interest served." *Ibid.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Here, Congress has not restrained anyone from engaging in commercial speech. Instead, it has required persons to contribute money to the government's own commercial speech. Because a requirement to provide money for commercial speech increases the total amount of information available to consumers and therefore interferes with First Amendment interests far less than a prohibition on commercial speech, the government should have greater flexibility to impose a funding requirement. That is especially so here because the commercial speech at issue consists of generic advertising of the very products that the persons who pay the assessments have chosen to produce and sell. Those persons could reasonably be determined by Congress to benefit from and agree with the central message of the program—the "desirability of beef and beef products." 7 U.S.C. 2902(13). See *Wileman Bros.*, 521 U.S. at 470 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program"). At the very least, a program that increases the amount of information that is made available to consumers should not be subjected to a more intense level of review than that afforded to restrictions on commercial speech.

2. The Beef Act satisfies intermediate scrutiny. First, the Beef Act advances substantial governmental interests that Congress has specifically identified: enhancing "the welfare of beef producers" and other

members of the $50 billion beef industry, stabilizing "the general economy of the Nation," and "ensur[ing] that the people of the United States receive adequate nourishment." 7 U.S.C. 2901(a)(3) and (4). As one court has recognized, the Beef Act was designed to prevent "further decay of an already deteriorating beef industry," which "would endanger not only the country's meat supply, but the entire economy." *United States* v. *Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990).

Second, advertising under the Beef Act directly advances those important interests. The Court has repeatedly recognized the "immediate connection between advertising and demand." *Central Hudson*, 447 U.S. at 569; see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001); *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 434 (1993). The record demonstrates that advertising under the Beef Act has proven effective in stimulating demand for beef. J.A. 170-171. Moreover, there is a collective action/free rider problem that limits the incentive for any one producer to pay for generic advertising for beef absent an assurance that other producers who necessarily will benefit from it will bear an equal share of the costs. Accordingly, absent government intervention, there would be obstacles to generic advertising that the Beef Act directly overcomes.

The assessment provision plays an integral role in advancing the government's interests. The modest assessment on those likely to benefit from generic advertising directly solves the collective action problem by eliminating the possibility of free riding. This Court has recognized the government's "vital" policy interest in avoiding "free riders," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991), and that interest is fully implicated here. Moreover, as already discussed, by

imposing the costs of Beef Act advertising on those who "most directly reap the benefits of" the government's pro-beef message, 7 U.S.C. 7401(b)(2), rather than the public at large, Congress avoided the risk of undermining the very support for the beef industry that it sought to engender from the public. The assessments also serve to give producers a stake in the promotion program and in the performance of their fellow producers who lend their experience and expertise by serving on the Beef Board and Operating Committee.

Finally, the Beef Act is carefully tailored to achieve its important interests. It does not prevent a producer from communicating any message of his own; it does not require any producer to engage in any actual speech; and it does not compel any producer to endorse or to finance any political or ideological point of view. *Wileman Bros.*, 521 U.S. at 469-470; see 7 U.S.C. 2904(10). It requires only that cattle producers contribute financially to generic advertising (and other activities) designed to benefit the beef industry as a whole by promoting the sale of the product that the industry exists to market. And it requires cattle producers to contribute in direct proportion to the degree to which Congress could reasonably conclude that they benefit from the generic advertising and promotion. The Act therefore assures a "reasonable" fit by imposing assessments "in proportion" to the interests served. *Fox*, 492 U.S. at 480. Furthermore, even if the Court were to conclude that the government speech doctrine does not validate the program and its assessment feature under the First Amendment, the substantial degree of governmental involvement in establishing and implementing the program significantly attenuates the nexus between any individual producer or importer who pays the modest assessment on his sales of beef and the

generic advertising that is ultimately disseminated following approval by the Secretary.

The Beef Act also provides opportunities for producers to seek to influence the direction of the program, such as through nominations to the Beef Board, see 7 U.S.C. 2904(1). And, if 10% of the producers wish to end the program altogether, they may ask the Secretary to conduct a referendum on whether the program should be terminated. 7 U.S.C. 2906(b). The Beef Act therefore satisfies intermediate scrutiny.

3. The court of appeals invalidated the Beef Act under intermediate scrutiny. Pet. App. 21a-28a. The court did not, however, independently evaluate whether that standard was satisfied. Instead, it viewed *United Foods* as having held that generic advertising programs do not satisfy intermediate scrutiny. Pet. App. 26a-28a. In *United Foods*, however, the government did not argue that the Mushroom Act assessments could be sustained under intermediate scrutiny, and the Court therefore did not address that issue. 533 U.S. at 410. The court of appeals therefore erred in short-circuiting the intermediate scrutiny inquiry and invalidating the Beef Act in reliance on *United Foods*.

In sum, the Beef Act is constitutional both because it establishes a valid program of government speech and because it satisfies intermediate scrutiny. The court of appeals' judgment invalidating the Beef Act should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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